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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

In re BLAKE H., a Person Coming Under the  
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.B.,

Defendant and Appellant.

F078202

(Super. Ct. No. 17CEJ300130-1)

**OPINION**

APPEAL from an order of the Superior Court of Fresno County. Gary L. Green,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

John L. Dodd, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County  
Counsel, for Plaintiff and Respondent.

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M.B. (mother) appeals from the juvenile court's order terminating her parental rights as to her now three-year-old son, Blake H. The order was made at what started out as a settlement conference that turned into a permanency planning hearing (Welf. & Inst. Code, § 366.26)<sup>1</sup> when mother failed to appear. Mother contends she was not informed of the consequences of her absence. We conclude she was denied procedural due process and reverse.

### **PROCEDURAL AND FACTUAL SUMMARY**

In April 2017, sheriff's deputies responded to a possible burglary and found Blake's father, F.H. (father), hiding in his car with five small baggies of methamphetamine. Blake, then 13 months old, was sitting unrestrained on the front seat of the car. The deputies found ammunition in the back seat in a bag. Father was arrested for possession of methamphetamine and ammunition.

The deputies were familiar with the parents. Father had a long criminal history and was a known methamphetamine user. Mother had no criminal history, but the deputies suspected she was using methamphetamine. They also believed she knew father was using drugs and allowed him to care for Blake. They contacted the Fresno County Department of Social Services (department) and placed a protective hold on Blake.

Mother denied knowing about father's drug use when she allowed him to care for Blake that day. She and father had been together for three years and used to live together but had been separated for three weeks. She and Blake were living with her maternal great-grandmother and maternal aunt and uncle.

Social worker Francisco Arrevalo telephoned mother the next day. Mother was upset because she had to move out of her grandmother's house and did not have a place to go. She said she first used methamphetamine approximately seven years before at the

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code unless otherwise specified.

age of 14. She used off and on and had never received treatment. She stopped using when she found out she was pregnant and had not used since. She did not think she needed drug treatment or any other services. She denied using methamphetamine the night before.

Mother and her maternal great aunt, Stephanie, attended a meeting with social workers to discuss the situation. Mother was disheveled and appeared sleepy and disoriented. She rocked in her chair and rubbed her hands together as they discussed her case. She said she was willing to participate in any services to regain custody of Blake but did not believe she needed them. She continued to deny using methamphetamine but was forced to admit it after the social worker showed her the positive test results from a specimen she submitted that day. The social workers filed a dependency petition following the meeting because mother's housing was unstable, and Stephanie was unable to take custody of Blake.

On May 1, 2017, the juvenile court conducted the detention hearing. Mother did not appear. Father appeared, and the court appointed counsel for him only. The court found prima facie evidence to detain Blake based on allegations the parents' drug use placed him at a substantial risk of suffering serious physical harm and/or neglect and father's ongoing drug use resulted in the removal of Blake's older half siblings. (§ 300, subds. (b)(1) & (j).) The court ordered the department to offer mother services when she made contact and set a combined hearing in June for jurisdiction and disposition.

The juvenile court convened the combined hearing in June 2017. Father appeared in custody with counsel. Mother did not appear and was unrepresented. On the department's recommendation, the court denied father reunification services for failure to treat his drug abuse (§ 361.5, subd. (b)(10) & (13)) and ordered mother to participate in

parenting, substance abuse and mental health services. The court ordered supervised visitation for both parents and set the six-month review hearing for November 2017.<sup>2</sup>

In September 2017, Blake was placed with his adult brother and his fiancée. In November 2017, the court granted the brother and fiancée's request for de facto parent status.

The six-month review hearing was conducted in February 2018. By that time, mother was homeless and unemployed, and father was serving a 16-month prison sentence. Mother maintained sporadic contact with the department and was not engaged in any of her services. She entered inpatient drug treatment in July 2017 but left after a few days. She attempted inpatient drug treatment again in September but left after two days while in the detox unit. In October, she notified the social worker she was using methadone to manage her addiction and wanted to return to inpatient treatment. She failed to attend and/or complete any parenting classes or a mental health assessment despite numerous attempts by both the department and service providers to schedule them. Her weekly visits however with Blake went well. She was loving and appropriate with him and he was comfortable with her. However, she was late on some occasions and missed three consecutive visits in September and October. As a result, her visitation referral was sent back to the department and she was not visiting as of late December 2017. Meanwhile, Blake was doing well in the care of his brother and his brother's fiancée.

In February 2018, following a contested six-month review hearing, the juvenile court terminated mother's reunification services and set a section 366.26 hearing for

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<sup>2</sup> Father filed a notice of appeal in our case No. F075837 from the juvenile court's dispositional order denying him reunification services. However, his appeal was dismissed pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835.

May 30, 2018.<sup>3</sup> In its report for the section 366.26 hearing, the department recommended the juvenile court terminate parental rights and free Blake to be adopted by his brother. The department opined it would not be detrimental to Blake to terminate parental rights but would be detrimental to him to remove him from his prospective adoptive parents.

The parents appeared on May 30, 2018, represented by counsel and the juvenile court granted their request for a contested hearing. The court stated there would be a settlement conference on August 1 and a trial on August 14. The court then directly addressed the parents, stating:

“[Y]ou’ll need to be here on two specific dates. The first is August 1st at 8:00 o’clock. The next is August 14 at 1:30. Please be on time. I will go forward even if you are not here. If you do not appear on those dates, there would be consequences. You would lose the ability to testify, you would lose the ability to assist your attorney to present evidence, and I could make my decision based on the [d]epartment’s written recommendations. It’s very important that you be here.”

In late July 2018, the parents’ attorneys filed their statements of contested issues, objecting to termination of their parental rights. Mother intended to argue the beneficial relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)) and to testify.<sup>4</sup>

Neither parent personally appeared at the settlement conference on August 1, 2018 but they were represented by counsel. Father’s attorney asked the juvenile court to continue the settlement conference, stating he did not know why father was not present. Otherwise, he objected to the recommendation to terminate parental rights. Asked

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<sup>3</sup> The parents filed timely notices of intent to file writ petitions in our case Nos. F077045 and F077046 but failed to file writ petitions, resulting in the dismissal of their cases.

<sup>4</sup> The beneficial relationship exception to adoption applies where the evidence supports “a compelling reason for determining that termination would be detrimental to the child [because] ... [¶] ... [the parent] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

whether he could assure the court father would appear on August 14, he stated he could not without speaking to father. Mother was represented by a substitute attorney who stated trial counsel intended to confirm the matter for trial and expected mother to be there. She did not know why mother was not present. She asked the court to confirm it for trial but if it did not, she objected to the recommendation. Asked whether trial counsel maintained contact with mother, substitute counsel responded, “Not to my knowledge.”

The juvenile court found there was not good cause to continue the settlement conference or the contested section 366.26 hearing and terminated parental rights. The court stated:

“With the request to continuing either the settlement conference or the trial, the Court finds there is no good cause. The Court first notes that under the court’s local rule 6.4.5, it is mandatory attendance for the parties at a settlement conference. They are not here, and they are in violation of that local court rule.

“In addition, when this matter was set on May 30th, I specifically admonished [mother] and [father] to be here, and if they were not here, there would be consequences, including the effective petition [*sic*] on my part to vacate the trial and move forward based on the Department’s recommendations.

“The Court does note that they do have due process rights to be heard. However, if they are not here to exercise their due process rights, there is not much the Court can do. In addition, neither [father’s nor mother’s attorney has] provided any assurance that they would appear at a further continued date. And as I recall, their attendance at other hearings has been spotty at best. Moreover, getting to the merits, it does not appear based on the Department’s reporting that either parent would be able to successfully invoke the beneficial relationship exception. Quite frankly, the reporting is quite clear that removal of the minor from the current care providers would be detrimental to the minor, and the minor is doing extremely well with the care providers, and they have established a parent/child bond with the child.

“With regards to the birth parents, their visits have been sporadic, and the minor has been noted to regress after visits with the birth parents.

“I’m really not seeing anything based on the parents’ participation and based on the merits that would warrant continuing the settlement conference and the trial. With that said, the Court is preparing to go forward.”

The juvenile court found proper notice of the hearing was provided and terminated parental rights after finding by clear and convincing evidence Blake would be adopted. This appeal ensued.

## DISCUSSION

Parents have a fundamental and compelling interest in the companionship, care, custody, and management of their children. (*Stanley v. Illinois* (1972) 405 U.S. 645, 651.) Due process entitles them to notice of juvenile proceedings affecting their interest in custody of their children. (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.)

“[D]ue process requires ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ [Citation.]” (*Ibid.*)

“A parent’s fundamental right to adequate notice and the opportunity to be heard in dependency matters involving potential deprivation of the parental interest [citation] has little, if any, value unless the parent is advised of the *nature* of the hearing giving rise to that opportunity, including what will be decided therein. Only with adequate advisement can one choose to appear or not, to prepare or not, and to defend or not.” (*In re Stacy T.* (1997) 52 Cal.App.4th 1415, 1424.) Thus, it is not enough to merely inform the parent of the date, time and place of a hearing; the parent has a due process right to be informed of the nature of the hearing, including what will be decided at the hearing, in order that the parent may make an informed decision whether to appear and contest the matter. (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 751 (*Wilford J.*); *In re Stacy T.*, *supra*, 52 Cal.App.4th at p. 1424; see also *In re Anna M.* (1997) 54 Cal.App.4th 463, 468 [notice regarding the setting of a section 366.26 hearing must notify the parent “of what [is] truly at stake in the section 366.26 hearing”].)

Mother contends the juvenile court advanced the section 366.26 hearing without notice when she failed to appear at the settlement conference. Respondent disputes that characterization, arguing the court set August 1 as a combined settlement conference and section 366.26 hearing and merely proceeded with the trial after finding no good cause to confirm it. The record supports mother's characterization of the court's action.

The juvenile court specifically stated there would be a settlement conference on August 1 and a "trial" on August 14. The minute order for the May 30, 2018 hearing indicates the court set a settlement conference on the section 366.26 hearing for August 1 and a contested section 366.26 hearing on August 14.<sup>5</sup> The court stated it would "go forward" even if mother did not appear and there would be consequences; she would lose her right to testify and present evidence and the court could make its decision based on the department's recommendations. However, the court did not explain that it would "go forward" to a trial on the settlement conference date if mother did not appear. Consequently, mother could assume, as any reasonable person would, that going forward from a settlement conference meant confirming the trial date in the absence of a settlement. Further, the court did not inform mother she would be forfeiting her trial rights if she did not appear at the settlement conference and that it could render a decision. Having informed mother there would be a "trial" on August 14, she could reasonably understand that to mean that she would forfeit her trial rights on that date if she did not appear and that the court could make its decision then.

Appellate courts have found due process violations in similar circumstances where a parent failed to appear at a settlement or pretrial conference. (*In re Stacy T.*, *supra*, 52 Cal.App.4th 1415; *Wilford J.*, *supra*, 131 Cal.App.4th 742.) *Wilford J.*, cited by respondent, is illustrative for our purposes.

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<sup>5</sup> The August 1, 2018 hearing is designated as "SC.26" on the May 30, 2018 minute order and the August 14, 2018 hearing is designated "C.26."



In *Wilford J.*, *supra*, 131 Cal.App.4th 742 the father, who did not appear at the detention hearing, was given a “generic notice” of the next hearing which advised him of basic rights but did not advise him of the nature of the proceedings. The proceedings were in fact a pretrial resolution conference. Father, who was not represented, did not appear, and the court proceeded with a jurisdictional hearing. On appeal, the father contended that his due process right to notice had been violated. The appellate court agreed: “Converting a noticed [pretrial resolution conference] into an unscheduled jurisdictional hearing, absent appropriate waivers from the parties or their counsel, deprives parents of vitally important procedural protections that are essential to ensure the fairness of dependency proceedings.” (*Id.* at pp. 746–747.) “Although the failure to respond to a court order to attend a [pretrial resolution conference] may serve as the basis for an award of sanctions (Local Rule 17.22(a); see Code Civ. Proc., § 177.5), nonappearance at a [pretrial resolution conference] does not justify conducting an entirely different proceeding or entry of the absent party’s ‘default’ on the allegations of the section 300 petition.” (*Id.* at p. 750.)

Thus, the *Wilford J.* court found the father was deprived due process. However, the court concluded the father forfeited the error on appeal by failing to address it in subsequent proceedings and affirmed the juvenile court’s orders. (*Wilford J.*, *supra*, 131 Cal.App.4th at pp. 754–755.)

Nevertheless, the *Wilford J.* court disapproved of the juvenile court’s practice, stating:

“The persistence of the practice of conducting unscheduled jurisdictional hearings following the nonappearance of a parent at a mediation or settlement conference appears to be an understandable, but mistaken effort to implement the well-founded principle that the best interests of the children demand that dependency proceedings move forward in a timely manner. [Citation.] The commendable goal of efficiently proceeding in dependency cases, however, cannot be

accomplished by sacrificing a parent's due process and statutory rights to meaningful notice.” (*Wilford J., supra*, 131 Cal.App.4th at pp. 752–753.)

We conclude mother was deprived due process in this case. Although she was advised that she had the right to call, confront and cross-examine witnesses and to present her own evidence, she was not informed she would forfeit those rights if she did not appear at the settlement conference. Consequently, she was not informed of the nature of the settlement conference; i.e., that it could evolve into a section 366.26 hearing, and that her parental rights could be at stake. Most importantly, she was not informed of the most important consequence of not appearing; that she would be forfeiting her parental rights.

Finally, we reject respondent's claim that a violation of mother's right to due process was harmless beyond a reasonable doubt because mother would not have been able to establish an exception to adoption. That the judgment is supportable by the evidence presented, but without any additional evidence mother might have presented had she been present, does not render the error in notice harmless.

In determining prejudice, we consider that mother would have appeared at the contested section 366.26 hearing. Although she did not attend the earlier hearings, she attended the six-month review hearing in November 2017 and all subsequent hearings. In addition, she intended to testify that the beneficial relationship exception to adoption applied and her parental rights should be preserved. While we recognize a parent raising the beneficial relationship exception to adoption faces a steep evidentiary hurdle, we cannot speculate as to the substance of mother's testimony nor can we say what the outcome would have been. Further, we cannot say what other evidence mother might have produced for the hearing.

In sum, mother was deprived her due process right to a contested section 366.26 hearing and the violation was not harmless beyond a reasonable doubt. Accordingly, we reverse the order terminating mother's parental rights, which necessitates we also reverse the order terminating father's parental rights (Cal. Rules of Court, rule 5.725(a)(1)), and

remand for a new, properly noticed and contested section 366.26 hearing as to both parents. Because we reverse the termination orders, we do not reach mother's additional contention the juvenile court denied her substantive due process.

### **DISPOSITION**

We reverse the juvenile court's orders terminating mother and father's parental rights. We remand for the juvenile court to set a contested Welfare and Institutions Code section 366.26 hearing.

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LEVY, Acting P.J.

WE CONCUR:

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FRANSON, J.

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PEÑA, J.